No. 13,727

United States Court of Appeals

For the Ninth Circuit

CONSOLIDATED FLOWER SHIPMENTS, INC.—BAY AREA,

Petitioner,

vs.

CIVIL AERONAUTICS BOARD and AIRBORNE FLOWER AND FREIGHT TRAFFIC, INC.,

Respondents.

PETITION FOR REHEARING.

ANTONIO J. GAUDIO,
305 Linden Avenue, South San Francisco, California,
Attorney for Petitioner.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Table of Authorities Cited

Cases

Codes

Miscellaneous

No. 13,727

United States Court of Appeals
For the Ninth Circuit

CONSOLIDATED FLOWER SHIPMENTS, INC.—BAY AREA,
Petitioner,

vs.

CIVIL AERONAUTICS BOARD and AIRBORNE FLOWER AND FREIGHT TRAFFIC, INC.,
Respondents.

PETITION FOR REHEARING.

To the Honorable William Denman, Chief Judge, and to the Honorable Associate Judges of the United States Court of Appeals for the Ninth Circuit:

Comes now petitioner, Consolidated Flower Shipments, Inc.—Bay Area, and petitions the above entitled Court for a rehearing of its opinion and decision, filed herein June 9, 1954, on the following grounds:

1. Said opinion is in conflict with the decision of the Supreme Court of the United States in *U. S. v. Pacific Coast Wholesalers Association,* 338 U.S. 689.

2. The Court erred in its holding that no contention is here made that the Civil Aeronautics Act

invests the Board with jurisdiction over petitioner's operations.

3. The Court erred in holding that petitioner controls any shipments of the flowers of its members out of the San Francisco Bay area.

4. The Court erred in concluding that petitioner may, without impediment, apply for a letter of registration as a common carrier air freight forwarder.

5. The Court erred in its interpretation and construction of §1(2) read in conjunction with §1(10)(21), defining air carriers "subject to the Act."

6. The Court erred in its review in not distinguishing the Board's order as to past and present operations of petitioner as "having been or now in violation" of §401a of the Act as an air freight forwarder.

7. The Court erred in denying petitioner's motion to suspend or abate the review in these proceedings pending the conclusion of Docket No. 5947 and the legislative process on H.R. 6310, 83rd Congress.

ARGUMENT.

In submitting its first ground for rehearing, petitioner respectfully submits that the Court has fallen into error in not properly apprizing the careful distinction which was drawn by the Supreme Court in its decision in the *Pacific Coast Wholesalers* case, supra. To hold that the lack of an express exemption provision *ipso facto* invests petitioner with a common carrier status as an air freight forwarder, is to decide

the very question at issue before consideration of the law as applicable to this record.

Section 1002(a) of Title 49, U.S.C. defines a freight forwarder as any person which holds itself out to the general public as a common carrier to transport or provide transportation of property * * * for compensation and which in the ordinary and usual course of its undertaking affiords the service which Bay Area as a cooperative affords to its members.

As is the case here, if the existence or not of an express exemption provision were material in the *Pacific Coast Wholesalers* case, there would have been no necessity for decision. The point which the Court endeavored to reconcile was whether, apart from its exempt status under the freight forwarders' act, the Pacific Coast Wholesalers Association was rendering a service to the general public as a common carrier freight forwarder, it being contended by the Commission that insofar as its service was made available to nonmembers as shippers, their payment or assumption of the obligation to pay the transportation charges constituted a holding out to the general public as a common carrier for compensation. On this score, the District Court said:

> "And the facts found by the Commission admit of but one conclusion as to this: that the association at all times acts solely at the request, and under the direction, and for the account and benefit of the member-purchaser. As between member and association, then, the former always acts as principal, the latter as agent.

> '* * * All of the shipments involved are consigned * * * upon instructions of the members of the association. Admittedly, the facilities of the association are not available to a nonmember shipper otherwise than through arrangements made by a member. And the necessary arrangements are that the member as principal instruct the association as agent to handle the shipment. Moreover, both the purpose and the result of the transaction is not to benefit the shipper, but to reduce transportation costs to the member through savings effected in cooperation with other members who likewise employ the association as transportation agent.' "
>
> "When this principal-agent relationship between member-purchaser and the association is borne in mind, it is clear that there is no profit to the association from the activity described in the Commission's report, 49 U.S.C. §1002(c). And it is equally clear that the association, as agent for the members, does not 'hold itself out to the general public to provide transportation of property for compensation.' " 49 U.S.C. §1002(a)(5).

Having come to this conclusion on the interpretation of §1002(a)(5) that the operation is not such as being held out to the general public to provide transportation of property for compensation, there was no occasion to determine *in that case* whether the exemption provisions contained in §1002(c) need be construed or applied. It was not common carriage.

Reviewing the above cited decision of the District Court, the Supreme Court on certiorari affirmed this holding with the following language:

> "The court considered as decisive that no shipments by the association were ever undertaken except at the behest and for the benefit of a member. Looking to the agency between member and association, rather than that between buyer and seller, the court saw no reasonable ground for ruling that the association was on a profit basis, *or that it was holding its service out to the general public.* We agree." (Emphasis ours.)

In reviewing the Board's legal conclusions from the record in this case, petitioner feels that the close analogy between the language in §401a of the Civil Aeronautics Act and §1(2)(21) thereof, when compared with the language before the Court in the *Pacific Coast Wholesalers* case, reasonably permits of only one conclusion, namely, that Bay Area, as a transportation agent in behalf of its members on a cooperative basis, does not "hold itself out to the general public to provide transportation of property for compensation in interstate air transportation".

In conclusion on this point, following the decision of the Supreme Court in the *Pacific Coast Wholesalers* case, the 81st Congress approved, on December 20, 1950, an amendment to subsec. a(5) above mentioned by adding, following the words "general public" the words "as a common carrier", which, according to the House Committee report, was "to remove any anomally and confusion regarding the status of freight forwarders and make clear that they have the status of common carriers."

In short, the asserted "public nature" of petitioner's operations can be likened to the operations of a shipping association under the freight forwarder act prior to the 1950 amendment, when some confusion prevailed as to whether the term "general public" might be deemed controlling as opposed to the status, in fact and in law, of a common carrier. To resolve this doubt, following the decision in the *Pacific Coast Wholesalers* case, the term "common carrier" was written into the freight fowarder's act, surface, thus writing into the act the effect of the Court's decision that there must be a holding out to the general public to provide transportation of property for compensation, i.e., the status must be that of a common carrier.

Comparing this legislative language and interpretation to the Civil Aeronautics Act providing in §1(2) that an air carrier is one who undertakes to engage in air transportation, defined in §1(21), as meaning the carriage by aircraft by persons or property as a common carrier for compensation or hire, the history of the *Pacific Coast Wholesalers* case, impels, therefore, the conclusion that the public nature of the operations is not controlling on a question such as is now before the Court, namely, a determination of common carrier status. We respectfully feel that the operations of the Bay Area cooperative are so closely analogous to that of the *Pacific Coast Wholesalers* case that there can be no rational or reasonable ground for ruling that the association is on a profit basis or that it is holding out its service to the gen-

eral public, and that the conclusion of the Board on this score should be reversed.

On the second point of assigned error, we call to the Court's attention that nowhere in the Act is the term "public in nature" to be found. The proposition requires no citation of authority, we believe, that public carriage may be other than common, according to the circumstances. In stressing the importance of *Natural Gas Service Co. v. Serve-Yu Cooperative,* 70 Arizona 235, 219 Pacific 2d 324, the Court failed to distinguish between direct carriers, holding, maintaining and operating its air line equipment and indirect carriers, which conceivably, need not own, maintain or operate aircraft. Moreover, in the field of public utility service, such as gas, fuel and water, the simple ownership, maintenance and operation of the facility has, by statutory enactment, caused such operations to be classed as public service corporations subject to regulation, irrespective of the particular undertaking and whether the same is limited or unlimited. The nature of the operation itself is determinative, in the view of the legislature, as to require public regulation. We have no concept in the Civil Aeronautics Act other than the question of an unrestricted holding out of service to the general public as a common carrier to provide transportation for compensation or hire. Moreover, the decision in the *Natural Gas Service Co.* case again looks to the relationship between the association and the public served rather than the relationship between the members of the

association, the particular distinction drawn by the Supreme Court in the *Pacific Coast Wholesalers* case.

On the third point of assigned error, we wish to make but brief further reference to the distinction in the *Pacific Coast Wholesalers* case, that in Bay Area's operation, all of the shipments involved are consigned upon instruction of the members "of the association". The cooperative as such has no control over the number or amount of shipments that move through the cooperative, that fact being determined by members on appropriate instructions to the cooperative.

The fourth point of assigned error, we believe, is a failure to fully appreciate the purpose of a nonprofit cooperative association of agricultural producers, not the least of which is "to make the distribution of agricultural products between producer and consumer as direct as can be efficiently done by handling and shipping the products of the members on a cooperative basis." See §1190 and §1193, Agricultural Code of the State of California.

To assume the status of a common carrier air freight forwarder as the Board would have us do, and thereby enter into the open and competitive business of air transportation to any and all persons or shippers of flowers who may see fit to utilize Bay Area service, would certainly favor the regulation of common carrier air freight forwarders, but it would defeat the very purpose of the member-producers of the cooperative. Such a common carrier undertaking would threaten a recurrence of the very evils which the members, on a cooperative basis, have sought to

avoid in the handling of such a highly perishable commodity as flowers and decorative greens.

In its fifth assignment of error, petitioner again points up the limitation of the Civil Aeronautics Act to common carriage. In the early decisions before the Board, in construing the language of §1(2)(10)(21) of the Act, defining "air carrier" the entire context and purpose of the Act has the effect of dividing air carriers into two classes:

1. Those who engage directly in the carriage by aircraft of property, persons or mail (not here involved);
2. Those who engage indirectly or by lease or some other arrangement in the carriage by aircraft of persons, property or mail.

Whether the undertaking be direct or indirect, the engagement must be the carriage of persons, property or mail by aircraft *as a common carrier. Railway Express Agency, Inc.,* 2 CAB 531.

Petitioner's sixth and seventh assignments of error refer in part to the second and third points of review as discussed in our briefs. While we feel that perhaps there is no requirement on the part of the Board to expressly inform petitioner how far it can go *without* breaking the law, we respectfully submit that the Board should be called upon to cite petitioner in what circumstances *it is* violating the provisions of §401(a) of the Act. If the cease and desist order of the Board would require Bay Area to cease its operation "as now conducted", does this have refer-

ence to its method of operation prior to the order of investigation herein; or, as it was developed in the record on the conclusion of the hearings; or, as it was argued, aliunde, at oral argument with reference to the nonprofit cooperative association? Or is it not, rather, a holding that any so-called forwarder operation must submit to regulation by the Board, whether it constitutes common carriage or not? If it is the former, then we must respectfully submit that the lack of specificity in the order makes it invalid of enforcement. If the latter, then clearly we are reading into the Civil Aeronautics Act that which the Congress never intended, namely, that non-common carrier operations will be regulated.

In the last analysis, and on the seventh assignment of error, it is difficult for us to reconcile the desire of the Civil Aeronautics Board to classify some sort of status as an exempt operation by non-profit cooperative associations of shippers, particularly in the agricultural field, and its refusal to accord a stay of its cease and desist order pending the conclusion of the hearing in Docket No. 5947. If the Board on its own motion assumes that there may be a clear distinction between nonprofit cooperative associations of shippers and general common carrier operations, it would not appear to be in the public interest to destroy a valid cooperative effort undertaken as permitted by law in the Agricultural Code, while consideration for administrative exemption or legislative exemption under H.R. 6310, is pending.

It is respectfully submitted therefore, that the Court grant Petitioner a rehearing in the subject proceeding and thereupon set aside the Board's orders under review and that final disposition of these proceedings be abated pending the conclusion of Docket No. 5947 or the enactment of H.R. 6310 into law.

Dated, South San Francisco, California,
June 28, 1954.

ANTONIO J. GAUDIO,
Attorney for Petitioner.

Certificate of Counsel

The undersigned counsel for the Petitioner in the within entitled proceeding does hereby certify that in his judgment it is well founded and that it is not interposed for delay.

Dated, South San Francisco, California,
June 28, 1954.

Antonio J. Gaudio,
Counsel for Petitioner,